

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TOMMY FUENTEZ,)	1:02-CV-05948 LJO HC
)	
Petitioner,)	
)	ORDER GRANTING CERTIFICATE OF
v.)	APPEALABILITY
)	
FRED BROWN,)	
)	
Respondent.)	

Petitioner is a state prisoner proceeding with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties having voluntarily consented to exercise of Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)(1), by order dated April 10, 2003, this case was assigned to the undersigned for all purposes, including entry of final judgment.

On October 30, 2005, Petitioner filed a request for certificate of appealability of the October 23, 2006, order denying his petition for a writ of habeas corpus. A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

1 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
2 district judge, the final order shall be subject to review, on appeal, by the court
of appeals for the circuit in which the proceeding is held.

3 (b) There shall be no right of appeal from a final order in a proceeding to test the
4 validity of a warrant to remove to another district or place for commitment or trial
5 a person charged with a criminal offense against the United States, or to test the
6 validity of such person's detention pending removal proceedings.

7 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
8 appeal may not be taken to the court of appeals from—

9 (A) the final order in a habeas corpus proceeding in which the
10 detention complained of arises out of process issued by a State
11 court; or

12 (B) the final order in a proceeding under section 2255.

13 (2) A certificate of appealability may issue under paragraph (1) only if the
14 applicant has made a substantial showing of the denial of a constitutional right.

15 (3) The certificate of appealability under paragraph (1) shall indicate which
16 specific issue or issues satisfy the showing required by paragraph (2).

17 If a court denies a petitioner's petition, the court may only issue a certificate of appealability
18 "if jurists of reason could disagree with the district court's resolution of his constitutional claims or
19 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
20 further." Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the
21 petitioner is not required to prove the merits of his case, he must demonstrate "something more than
22 the absence of frivolity or the existence of mere good faith on his . . . part." Miller-El, 123 S.Ct. at
23 1040.

24 In the present case, the Court finds that Petitioner has made the required showing.
25 Accordingly, the Court hereby GRANTS a certificate of appealability on the question of whether
26 Petitioner received ineffective assistance of counsel with respect to the plea bargain.

27 IT IS SO ORDERED.

28 **Dated: November 9, 2006**
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/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE